Guardsmark, LLC *and* Service Employees International Union, Local 24/7; Jee Venish. Cases 20–CA–31495–1 and 20–CA–31573–1

June 7, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On July 28, 2004, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

We unanimously adopt the judge's conclusion that the Respondent violated Section 8(a)(1) of the Act by maintaining a rule that prohibits its employees from complaining about their terms and conditions of employment to the Respondent's customers. Chairman Battista and Member Schaumber also adopt the judge's conclusion that the Respondent did not violate the Act by maintaining a work rule that forbids employees from fraternizing with coemployees or with the employees of Respondent's customers. Contrary to the judge, however, Chairman Battista and Member Liebman conclude that Section 8(a)(1) prohibits the Respondent from maintaining a rule that proscribes employee solicitation at any time while in uniform. We shall also modify the judge's proposed Order to require immediate rescission or modification of the unlawful rules and to provide for nationwide posting of a remedial notice.

I. ALLEGEDLY UNLAWFUL WORK RULES

The Respondent provides uniformed guard services. All uniformed personnel are given a comprehensive employee handbook that includes, inter alia, the following rules and policies:

> GENERAL ORDERS, Paragraph 5: While on duty you must follow the chain of command and report only to your immediate supervisor. If you are not satisfied with your supervisor's response, you may request a meeting with your supervisor and his or her supervisor. If you become dissatisfied with any other aspect of your employment, you may write the Manager in Charge or any member of management. Written complaints will be acknowledged by letter. All complaints will receive prompt attention. Do not register complaints with any representative of the client.
>
> . . . .
>
> GENERAL ORDERS, Paragraph 18: Solicitation and distribution of literature not pertaining to officially assigned duties is prohibited at all times while on duty or in uniform, and any known or suspected violation of this order is to be reported to your immediate supervisor immediately.
>
> . . . .
>
> REGULATIONS, Paragraph 4: While on duty you must NOT . . . fraternize on duty or off duty, date or become overly friendly with the client's employees or with co-employees.

The complaint alleges that each of these rules unlawfully restricts employees in the exercise of their Section 7 rights.

When faced with an allegation that an employer's work rule violates Section 8(a)(1), we apply the principles set forth in *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), and, more recently, in *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (2004). In determining whether a challenged rule is lawful, we will give the rule a reasonable reading. That is, we will refrain from reading particular phrases in isolation or presuming improper interference with employee rights. Consistent with that approach, we inquire, first, whether the work rule in question explicitly restricts activities protected by Section 7. If it does, we will declare the rule unlawful. If the rule does not explicitly restrict Section 7 activity, we will only find a violation upon a showing that: (i) employees would reasonably construe the language to prohibit Section 7 activity; (ii) the rule was promulgated in response to union activity; or (iii) the rule has been applied to restrict the exercise of Section 7 rights.

A. The "Chain-of-Command" Rule

The judge concluded that Respondent violated Section 8(a)(1) by maintaining a work rule that forbids employees "dissatisfied with any . . . aspect of [their] employment" from "register[ing] complaints with any representative of the client." We agree. As the judge found, such a rule explicitly trenches upon the right of employees under Section 7 to enlist the support of an employer's clients or customers regarding complaints about terms and conditions of employment. See *Allied Aviation Service Co. of N.J.* 248 NLRB 229 (1980).

In exceptions, the Respondent argues that its chain-of-command rule applies exclusively to on-duty conduct and is therefore a permissible regulation of employee

[1] There are no exceptions to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by disciplining one of its employees, Daniel Higgins, in retaliation for his complaints that one of his superiors regularly made racially offensive remarks.

conduct. We find no merit to the exception. By instructing employees to follow the chain of command "while on duty," the Respondent's rule arguably limits its prohibition on lodging complaints with employees outside the chain of command to working time only. However, its prohibition on discussing terms of employment with customers is not similarly time-limited.[2] It is absolute—"[d]o not register complaints with any representative of the client." The judge's conclusion that the rule violates the Act is therefore consistent with our holdings in *Lafayette Park Hotel* and *Lutheran Heritage Village-Livonia*.[3]

B. The Fraternization Rule

The judge also concluded that the Respondent did not violate the Act by maintaining a work rule that directs employees not to "fraternize on duty or off duty, date[,] or become overly friendly with the client's employees or with co-employees." The judge reasoned that such a rule "does not on its face, or by reasonable implication, preclude activities protected by the Act." The General Counsel excepts, arguing that employees reasonably would understand the rule to prohibit activity protected by Section 7.

We find no merit to this exception. The Respondent's rule is somewhat similar to a work rule we reviewed in *Lafayette Park Hotel*, supra, and found lawful. There, the employer's rule mandated that "[e]mployees are not allowed to fraternize with hotel guests anywhere on hotel property." 326 NLRB at 825. We concluded that the rule was lawful because employees would not reasonably read "this rule as prohibiting protected employee communications . . . about terms and conditions of employment." Id. at 827. Although the Respondent's rule is not identical to the one in *Lafayette Park Hotel*, we find that any differences between the rules are not material and do not warrant a different outcome here.

Contrary to our dissenting colleague, we do not believe that the Respondent's rule would reasonably tend to chill protected employee activity. The Respondent's proscription against fraternization appears alongside proscriptions on "dat[ing,] or becom[ing] overly friendly with the client's employees or with co-employees." That being so, we believe that employees would reasonably understand the rule to prohibit only personal entanglements, rather than activity protected by the Act. In our view, it would be an unreasonable stretch for an employee to infer that speaking to others about terms and conditions of employment is a "fraternization" that is condemned by the rule. As in *Lutheran Heritage Village*, our dissenting colleague continues to advocate finding a violation where an employee could *possibly* perceive a conflict between a rule and protected activity. We, instead, limit the Board's reach to rules, unlike this one, where an employee would reasonably perceive such a conflict.

We recognize that the rule in *Lafayette Park Hotel* prohibited fraternization with guests, while the rule here prohibits fraternization with client employees or coemployees. However, in context, the rule here is reasonably understood as prohibiting personal entanglements, rather than activity protected by the Act.

Moreover, as the judge noted and our dissenting colleague ignores, the Respondent's rule is designed "to provide safeguards so that security will not be compromised by interpersonal relationships either between Respondent's fellow security guards or between Respondent's security guards and clients' employees." Given those heightened security concerns, we think the Respondent's justification for its fraternization rule is even stronger than that of the employer in *Lafayette Park Hotel*, where we concluded that a fraternization rule was a proper means for preventing the "appearance of favoritism, claims of sexual harassment, and employee dissension created by romantic relationships in the workplace." 326 NLRB at 827 fn. 14.

C. The No-Solicitation-in-Uniform Rule

The Respondent maintains a rule that prohibits employee "[s]olicitation and distribution of literature not pertaining to officially assigned duties . . . at all times while . . . in uniform." The General Counsel alleges that this rule constitutes an overly broad prohibition on protected union solicitation, in violation of Section 8(a)(1). Unlike the judge, we agree with the General Counsel.

It is well established that employees have the right under Section 7 to engage in union solicitation on the employer's premises during nonwork time, unless the employer can demonstrate the need to limit the exercise of that right in order to maintain production or discipline. *Republic Aviation Corporation v. NLRB*, 324 U.S. 793, 803 (1945), citing *Peyton Packing Co.*, 49 NLRB 828, 843–844 (1943), enfd. 142 F.2d 1009 (5th Cir.), cert. denied 323 U.S. 730 (1944). Accordingly, the Board has consistently held that (absent such a justification) "a rule prohibiting employee solicitation, which is not by its

[2] That conclusion is reinforced by the Respondent's own memoranda elaborating on the rule. For example, training guidelines for new employees state, "if there is a problem with another security officer, or with their paycheck or uniform, these must be reported directly to the[] Account Manager . . . or Site Supervisor . . . . These internal matters are NOT to be reported to the building engineer, Property manager, or Janitors or other building employees." Likewise, a memo to uniformed employees states, "Internal Guardsmark Issues, such as your paycheck, schedule, uniform, problem, performance issues with another Guardsmark . . . officer, etc. should be directed to your Site Supervisor, and/or [the Account Manager], NOT the client." Finally, in a written counseling form given to one employee, the Respondent's Account Manager stated, "if you encounter ANY internal Guardsmark internal problem . . . DO NOT . . . notify any [clients'] employee, . . . any janitors or other building employees." None of these directions is limited to work time.

[3] Chairman Battista notes that a more narrowly tailored prohibition on employee communication to clients may be lawful. For example, a prohibition on disloyal comments to a client or comments that constitute secondary inducement or coercion might not violate Sec. 8(a)(1).

terms limited to working time, would violate [Section] 8(a)(1) . . . ." *Lutheran Heritage Village-Livonia*, supra, slip op. at 1–2 fn. 5. Here, the rule undoubtedly places restrictions on protected off-work solicitation.[4] Thus, absent some persuasive justification for the rule, it should be deemed overbroad and unlawful.

The Respondent's only stated justification for the rule is that allowing employees to engage in off-duty solicitation while in uniform would "leav[e] the impression that it [was] giving unlawful assistance to a labor organization, which would likely happen *if Respondent's insignia were not camouflaged* (emphasis added)." Thus, the only rule that the Respondent seeks to justify is one against soliciting in uniform *with the company insignia exposed*. Indeed, that is the only rule that the Respondent claims to maintain. It asserts that employees are free to engage in union solicitation as long as they cover the company insignia, and that it has so informed employees in meetings and private conversations. In response to this argument, the General Counsel contends only that employees would not reasonably read the rule as prohibiting only solicitation with insignia exposed, and that the Respondent has not shown that it has conveyed its interpretation of the rule to all of its employees.[5] The issue before us, then, is a narrow one: whether employees could reasonably construe the Respondent's rule against soliciting while "in uniform" as prohibiting solicitation with the company's insignia covered, which all agree (or at least concede) is conduct protected by Section 7.

The judge concluded that the rule did not violate the Act, reasoning that "it seems reasonable to presume that employees, without having to be specifically told, would understand that removing or covering their uniforms will constitute compliance with this provision." We disagree, because we agree with the General Counsel that there is nothing in the plain language of the rule that communicates to employees that the rule allows such a safe harbor. Nor, contrary to the judge and our dissenting colleague, is there any reason to think that reasonable employees should intuit such an unstated exception to the plain language of the rule. Indeed, in our view, a reasonable employee could read the rule as applying to all solicitation by employees wearing all or part of their uniforms, regardless of whether the Respondent's insignia were visible.[6]

The Respondent has not established a legitimate and substantial business justification for its "no-solicitation-in-uniform" rule, as we find that its employees could reasonably interpret it. Indeed, the Respondent has not attempted to do so. The Respondent has, of course, offered a justification for the rule as the Respondent interprets it—prohibiting only solicitation with the company insignia visible. But that is beside the point, for two reasons. First, it is the employees' reasonable interpretation that determines whether the rule would interfere with the exercise of their Section 7 rights. Second, this justification is a defense to an allegation that has not been made. As stated above, the General Counsel does not contend that the employees' right to solicit with insignia exposed should necessarily take precedence over the Respondent's business concerns.[7]

Finally, although the Respondent argues that it actually notified some employees that solicitation is permissible if the uniform is obscured, that is plainly insufficient to avoid a violation of the Act. To be effective, narrowing interpretations of overly broad rules must be communicated to the entire work force covered by the rule. See *Chicago Magnesium Castings*, 240 NLRB 400, 403–404 (1979), enfd. 612 F.2d 1028 (7th Cir. 1980).

For the foregoing reasons, then, we reverse the judge and find that the Respondent violated Section 8(a)(1) by maintaining its "no-solicitation-in-uniform" rule.

II. REMEDIAL ISSUES

Having found that one provision of the Respondent's employee handbook violates the Act, the judge ordered the Respondent, "[a]t a time when the employee handbook is being revised or reissued," either to delete the offending rule or to modify it so that it does not prohibit activities protected by the Act. In addition, the judge ordered the Respondent to post copies of the remedial notice only at its San Francisco office. The General Counsel excepts, arguing that the Respondent should be required to take immediate action to excise or modify the unlawful provisions of the employee handbook and that copies of the remedial notice should be posted at Respondent's offices nationwide. We find merit to the exception.

We believe that requiring immediate rescission of the unlawful rules and modification of the handbook will

[4] In addition, the rule does not restrict its prohibition to work areas. The Board has also consistently held that employers may not restrict solicitation and distribution activities in nonwork areas. See *Jewish Home for the Elderly of Fairfield County*, 343 NLRB No. 117 (2004).

[5] Significantly, as the judge observed, the General Counsel does not appear to argue that uniformed security guards have an unfettered right under Sec. 7 to engage in union solicitation while in uniform. In particular, he does not contend that the Respondent's rule would violate Sec. 8(a)(1) even if the Respondent's interpretation of it were made clear to the employees.

[6] Where, as here, a no-solicitation rule is ambiguous, the ambiguity is resolved against the employer, the promulgator of the rule. *TeleTech Holdings, Inc.*, 333 NLRB 402, 403 (2001).

[7] We therefore need not decide whether the Respondent's stated reason for maintaining this rule—to avoid giving the impression of furnishing unlawful assistance to a labor organization—would justify limiting the employees' exercise of their Sec. 7 rights. In this regard, however, we know of no decision of the Board that suggests that an employer would violate Sec. 8(a)(2) by permitting employees to engage in off-duty union solicitation while in uniform.

best effectuate the remedy for our finding that certain of Respondent's work rules unlawfully chill the exercise of employee rights under Section 7. The judge's remedy, by contrast, could leave some employees (especially those who are hired after the period during which the notice is posted) without assurance that they may engage in protected conduct without fear of being subjected to the unlawful rules. An order requiring immediate modification of the unlawful rule is consistent with the orders issued in conjunction with our most recent decisions. See *Ark Las Vegas Restaurant Corp.*, 343 NLRB No. 126, slip op. at 4 (2004) (ordering immediate removal of unlawful rule from employee handbook); *Jack in the Box Distribution Center Systems*, 339 NLRB 40, 41 (2003) (same).[8]

Concerning the scope of notice posting, we have consistently held that, where an employer's overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect.[9] See, e.g., *Albertson's, Inc.*, 300 NLRB 1013 fn. 2 (1990). There is no dispute in this case that the unlawful rules apply to all of the Respondent's employees nationwide. Accordingly, we will modify the judge's Order to provide for nationwide posting of the remedial notice.

ORDER

The National Labor Relations Board orders that the Respondent, Guardsmark, LLC, San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing its handbook provisions prohibiting employees from registering complaints regarding their wages, hours or conditions of employment with Guardsmark's clients and from soliciting and distributing literature during off-duty time while in uniform.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) Rescind the handbook provisions prohibiting employees from registering complaints regarding their wages, hours, or conditions of employment with Guardsmark's clients and from soliciting and distributing literature during off-duty time while in uniform.

(b) Furnish all current employees with inserts for the current employee handbook that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised handbooks that (1) do not contain the unlawful rules, or (2) provide the language of lawful rules.

(c) Within 14 days after service by the Region, post at its offices nationwide copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since May 6, 2003.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 7, 2005

Robert J. Battista, Chairman

(SEAL) NATIONAL LABOR RELATIONS BOARD

[8] The Respondent may comply with our Order by rescinding the unlawful provisions and republishing its employee handbook without them. We recognize, however, that republishing the handbook could entail significant costs. Accordingly, the Respondent may supply the employees either with handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing which will cover the old and unlawfully broad rules, until it republishes the handbook without the unlawful provisions. Thereafter, any copies of the handbook that are printed with the unlawful rules must include the new inserts before being distributed to employees. See *Farr Co.*, 304 NLRB 203, 257 (1991).

[9] To be sure, an employer may avoid imposition of a company-wide remedy by showing that "special circumstances" justify a narrower remedy. See *Raley's, Inc.*, 311 NLRB 1244 fn. 2 (1993). The Respondent, however, does not contend that any special circumstances are present.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER LIEBMAN, dissenting in part.

I dissent only from the majority's conclusion that it is lawful for the Respondent to maintain a rule prohibiting employees from "fraterniz[ing]" with coemployees or customers. I adhere to the views expressed in my dissent in *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). There, I concluded that a similar rule did not adequately define what is proscribed and that the ambiguity in the rule tended to chill reasonable employees in the exercise of their Section 7 rights. Id. at 833. For the same reasons, I would find that the Respondent's rule in this case offends Section 8(a)(1) of the Act.

The majority suggests that the present rule is defined more precisely because it is coupled with a prohibition on "dat[ing,] or becom[ing] overly friendly with the client's employees or with co-employees." Contrary to the majority's approach, I would not require a reasonable employee to apply the legal maxim of *noscitur a sociis*[1] in interpreting the Respondent's employee handbook. The issue is not what the *best* reading of the rule is, but whether a reasonable employee could interpret the rule to cover protected activity. See, e.g., *Double D Construction Group, Inc.*, 339 NLRB 303, 303–304 (2003). While this standard demands some care from employers in drafting rules, it is necessary to ensure that the Section 7 rights are not chilled—particularly because employers have no current obligation to inform employees of their rights under the Act.

Here, a reasonable employee certainly could understand the Respondent' rule to sweep much more broadly than prohibiting only personal entanglements with clients and coworkers. [2] The rule already bars dating and becoming "overly friendly" with those individuals, so a reasonable employee might well conclude that the prohibition on fraternizing must apply to something else. Cf. *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75, slip op. at 6 (2004) (dissent of Members Liebman and Walsh). The primary meaning of the term "fraternize," in turn, is "to associate in a brotherly manner," Webster's New World Dictionary 555 (2d ed. 1984), and that kind of association is the essence of workplace solidarity. Thus, I believe that employees could reasonably understand the rule to trench upon their right under Section 7 to join together for mutual aid or protection. Under the framework established in *Lafayette Park Hotel* and *Lutheran Heritage Village*, the rule is unlawful.

[1] That maxim holds that the meaning of otherwise ambiguous terms can be ascertained by reference to the meaning of other words or phrases associated with it. See Black's Law Dictionary 1060 (6th ed. 1990).

[2] Indeed, the chilling effect of this rule is far greater than that of the rule in *Lafayette Park Hotel*. There, the rule merely barred employees from "fraterniz[ing]" with customers on the employer's property, 329 NLRB at 833, whereas the rule in this case applies to communications with customers and co-employees alike and is not limited to activity on the employer's property.

Dated, Washington, D.C. June 7, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting in part.

Though I agree with the majority in all other respects, I respectfully dissent from my colleagues' conclusion that Respondent's "solicitation-in-uniform" rule violates Section 8(a)(1). Like the judge, I believe that an employer, particularly one engaged in providing armed security services, has a substantial and legitimate business interest in prohibiting employees from engaging in solicitation and distribution activities while wearing official uniforms clearly identifying them as representatives of that employer.

My conclusion is consistent with the standard reaffirmed in the Board's recent decision in *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (2004). That case did not purport to alter existing law that even a facially overbroad rule may be justified by a legitimate and substantial business reason.[1] Here, as the judge found, and the General Counsel did not contest, the purpose of the rule was obvious: to "put employees on notice that [solicitation] activities are permitted when their attire does not denote *that they are acting in an official capacity on behalf of the Respondent*." (Emphasis added.)[2]

As my colleagues acknowledge, even the General Counsel does not argue that Respondent's employees

[1] I note that in the instant case, the prohibition against solicitation activities applies only while "on duty" (i.e. during working time) or while off duty but in the Respondent's official uniform. Respondent's rule contains absolutely no prohibitions on solicitation activities in work or nonwork areas while not in uniform; hence, *Jewish Home for the Elderly of Fairfield County*, 343 NLRB No. 117 (2004), cited by my colleagues, is inapposite. That case dealt with a rule that flatly *prohibited* solicitation in specified areas of a nursing home, which the judge found to encompass areas beyond those devoted to immediate patient care. Similarly, *Republic Aviation Corporation*, 324 U.S. 793, 803 (1945) and the Board decision to which it cited, *Peyton Packing Co.*, 49 NLRB 828, 843–844 (1943), enfd. 142 F.2d 1009 (5th Cir.), cert. denied 323 U.S. 730 (1944) referred only to the presumptive invalidity of rules that prohibit solicitation by an employee outside of working hours. Respondent's rule contains no such prohibition; employees are free to solicit while not "on duty," so long as they are not displaying attire that clearly denotes them as representatives of the Respondent. I am aware of no Board decision which deems presumptively invalid a rule that imposes restrictions on wearing official uniforms while engaging in off-duty solicitation and distribution activities.

[2] Respondent's witness so testified at the hearing before the judge, indicating that the purpose of the rule was to ensure that its uniformed guards (whose uniforms bear emblems identifying the company) were not misperceived as acting on behalf of Guardsmark while engaged in such activities. In light of that testimony, the judge's finding, and the fact that the rule is not limited to soliciting on behalf of labor organizations, my colleagues err in asserting that Respondent's "only stated justification" for the rule is to avoid the appearance of unlawfully assisting a labor organization.

should be permitted to engage in solicitation activities while in uniform. Rather, the General Counsel's sole contention is that the rule is unlawful because it allegedly fails to make sufficiently clear to employees that they may engage in solicitation activities so long as they cover or remove their official uniforms. As to that argument, and mindful of our admonition in *Lutheran Heritage* that work rules are drafted by laymen and are to be given a reasonable reading without presuming improper interference with employee rights, I readily agree with the judge that (1) the rule is sufficiently clear on its face to advise employees that they should not engage in unofficial business while in uniform, which implies that such activities are permissible while not in uniform; and (2) that employees would reasonably understand, without having to be specifically told, that removing or covering their uniforms would constitute compliance with this provision.[3] Consequently, like the judge, I would dismiss this allegation of the complaint.

Dated, Washington, D.C. June 7, 2005

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce the provisions in our employee handbook that may be reasonably interpreted as prohibiting employees from registering complaints with clients regarding wages, hours or other conditions of employment or from engaging in solicitation and distribution of literature during off-duty time while in uniform.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act.

WE WILL rescind the handbook provisions regarding registering complaints with clients and solicitation and distribution of literature while in uniform.

WE WILL supply all of you with inserts for the current employee handbook that (1) advise you that the unlawful rules prohibiting employees from registering complaints with clients regarding wages, hours or other conditions of employment and from engaging in solicitation and distribution of literature during off-duty time while in uniform have been rescinded or (2) provide the language of lawful rules; or WE WILL publish and distribute revised handbooks that (1) do not contain the unlawful rules or (2) provide the language of lawful rules.

GUARDSMARK, LLC

Kathleen Schneider and *John Ontiveros, Attys.*, for the General Counsel.

William Dougherty and *Edward Young, Attys.*, of Memphis, Tennessee, for the Respondent.

Antonio Ruiz, Atty., of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in San Francisco, California, on April 29 and 30, 2004. The charge in Case 20–CA–1495–1 was filed on September 25, 2003, by Jee Venish, an individual. The charge in Case 20–CA–31573–1 was filed by Service Employees International Union, Local 24/7 (Union) on November 16, 2003. On January 26, 2004, following the issuance of separate complaints, the Regional Director for Region 20 of the National Labor Relations Board (Board) issued an order consolidating the aforementioned cases. The complaints allege violations by Guardsmark, LLC (Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act (Act). The Respondent, in its answers to the complaints, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (General Counsel) and counsel for the Respondent.

On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

[3] I do not disagree that the Respondent could have been more specific in drafting the rule. Nonetheless, the standard we adopted in *Lutheran Heritage* recognizes that the mere possibility of an unlawful interpretation is insufficient to invalidate a rule under the Act. Like the judge, I believe employees would reasonably construe the term "in uniform" in light of the rule's purpose: to avoid attribution of their off-duty activities to the Respondent. Since there is no evidence that any aspect of the guards' uniforms, other than the Guardsmark insignia, would affiliate them with Respondent, I agree with the judge that employees would reasonably read the rule to permit solicitation activities when the insignia cannot be seen.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation engaged in the business of providing uniformed security personnel to commercial entities, with its headquarters and principle place of business in New York, New York, and an office and place of business located in San Francisco, California. In the course and conduct of its business operations, the Respondent performs services valued in excess of $50,000 directly to customers outside the State of California, and purchases and receives goods and materials valued in excess of $5000 which originate outside the State of California. It is admitted and I find that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues in this proceeding are whether the Respondent has violated Section 8(a)(1) of the Act by maintaining written policies that restrict employees from engaging in activities protected by the Act, and whether the Respondent has violated Section 8(a)(1) and (3) of the Act by removing an employee from a job.

B. Facts

The Respondent is a nationwide employer that provides uniformed guard services to customers. The Respondent provides all its uniformed personnel with a comprehensive employee handbook consisting of 211 pages. Among the rules and policies contained in the handbook are the following:

> GENERAL ORDERS, Paragraph 5 (page 17): While on duty you must follow the chain of command and report only to your immediate supervisor. If you are not satisfied with your supervisor's response, you may request a meeting with your supervisor and his or her supervisor. If you become dissatisfied with any other aspect of your employment, you may write the Manager in Charge or any member of management. Written complaints will be acknowledged by letter. All complaints will receive prompt attention. Do not register complaints with any representative of the client.
>
> GENERAL ORDERS, Paragraph 18 (page 20): Solicitation and distribution of literature not pertaining to officially assigned duties is prohibited at all times while on duty or in uniform, and any known or suspected violation of this order is to be reported to your immediate supervisor immediately.
>
> REGULATIONS, Paragraph 4 (page 24): While on duty you must NOT: . . . (p) fraternize on duty or off duty, date or become overly friendly with the client's employees or with coemployees.

Daniel Higgins was employed as a security guard for the Respondent at the Fairmont Hotel. Higgins was the only Guardsmark employee on the day shift. The other security personnel on his shift were employees of the Fairmont Hotel. Higgins was a security dispatcher. His job was primarily to monitor surveillance and related equipment from a security booth, and keep in contact with Fairmont security personnel who patrolled the premises.

Higgins believed that the Fairmont's lead security officer, Gene Saucedo, was making inappropriate racial slurs regarding other Guardsmark and Fairmont employees. On May 5, 2003,[1] Higgins sent a handwritten memorandum to his superiors at Guardsmark and provided a copy to the Fairmont's security director, as follows:

> Mr. Saucedo refers to people of African heritage as: "Johnnies."
>
> On more than one occasion, he has explained to me why he uses the work "Johnnie" to describe a human being of African heritage, however; [(sic] I ask you to ask Mr. Saucedo to explain this to you. His words will put this in its proper light.
>
> In the months that I have known Mr. Saucedo, he has used this word to describe, on more than one occasion: [lists seven names, including Latressa Johnson].
>
> Recently, Latressa Johnson was removed from her post. (Guardsmark dispatcher).
>
> Mr. Saucedo explained to me that he approved of her removal because she had made mistakes during her first week on the job.
>
> I realize the Fairmont Hotel soundly endorses Mr. Saucedo's job performance (i.e., He was recently named "Employees of the Month" and promoted to "Lead Officer") however; [sic] I do not feel Mr. Saucedo should be involved in the "hiring and firing" process of the Security Dept.
>
> I am compiling a list of people who have also heard Mr. Saucedo use the word "Johnnie" when referring to people of African Heritage. The first name on the list: Larry Grant.
>
> Daniel David Higgins 5/5/03

Higgins testified that prior to preparing this memo he spoke to a Fairmont security officer, Larry Grant, and told him that he, Higgins, was going to complain about Saucedo, as follows:

> [T]his had gone far enough, that I didn't think [Saucedo] was the type of individual that should assess, train, evaluate employees, that I didn't think [Saucedo] was fit to be a lead officer for the Fairmont Hotel. And I was going to complain about his use of the word 'Johnnie', because I felt it was a racial slur coded.[2]
>
> Higgins testified that he also spoke to three other Fairmont employees and one Guardsmark employee, Latressa Johnson, about the matter, but there is no further record evidence regarding such conversations. Thus the record remains unclear as to the details of the conversations or whether they took place prior or subsequent to the time Higgins submitted his written complaint.

Apparently in late May, Higgins was summoned to a meeting in the Fairmont's human resources department. Those pre-

[1] All dates or time periods are within 2003 unless otherwise specified.

[2] Higgins was asked by the General Counsel, "What was Grant's response?" and the Respondent's hearsay objection was sustained. Grant was not called as a witness in this proceeding.

sent on behalf of the Fairmont were the Fairmont's director of security, Perry Miller, and two Fairmont Human Resources Representatives Michelle Gaul and Michelle Bertrand. Those present for the Respondent were two of Higgins' supervisors, Daphne Smith and Emily Fan. The meeting was for the purpose of discussing Higgins' complaint. Higgins testified that the Fairmont human resources representatives questioned him about his complaint. The other participants, according to Higgins, "had very little or nothing to say." Higgins was asked what took him so long to come forward with his complaint,[3] and whether he may have said anything to provoke or entice "any type of racial or bigoted dialogue" from Saucedo. They also asked him who else he would place on his list of witnesses "as time went by." Higgins named other individuals whom he believed had heard Saucedo make similar remarks. Higgins was asked whether he wanted to say anything else, and he said that he believed Saucedo should not hold a lead officer's position. Fairmont Human Resources Representative Michelle Gaul stated that Saucedo was her colleague and it was her job to defend him. Higgins was then asked to leave the meeting.

Higgins testified that on about June 8, 2003, he received a phone call from Daphne Smith. Smith told him that he was being removed from his job at the Fairmont, and explained, according to Higgins, that:

> Michelle Gaul did not like your tone of voice, did not like what you had to say at the meeting about Gene Saucedo, and the next time you're at a similar meeting you need to watch what you say, you don't need to return to the Fairmont, do not return to the Fairmont after this day, do not contact any Fairmont employee, and do not contact any GUARDSMARK employee at the Fairmont.

Higgins, in an affidavit regarding this conversation states:

> I was working the 7:00 a.m. to 3:00 p.m. shift at the Fairmont Hotel security booth. Daphne Smith called me. She said, Dan, this is Daphne. She said to me something to the effect of, "you asked me to tell you the reason why you were being removed and the reason is because Michelle Gault (sic) felt like you had issued an ultimatum", so the next time something like this happens, you need to watch what you say. When you leave here (the Fairmont) you are not to come back and do not contact the Fairmont employees or the GUARDSMARK employees.

Higgins was not terminated by the Respondent, and initially was offered a graveyard position with another client, which he apparently declined. After about a month he accepted a daytime job with another client of the Respondent.

Smith, an account manager for the Respondent and one of Higgins's supervisors, testified that she told Higgins he was being removed from the Fairmont at the request of Security Director Miller for performance issues that she had discussed with him previously. Explaining this rationale, Smith testified that during May Higgins was reported for leaving his post unattended and becoming too friendly with some of the other employees by interacting with them outside the security booth instead of monitoring his post. Smith testified that Miller brought these matters to her attention, and that she investigated them by interviewing Higgins and Saucedo. Thereafter, she spoke to Higgins about these matters. According to Smith, Higgins did not deny that he left the security booth; rather, he explained that while talking to other employees he was never out of earshot of the telephone in the security booth.

Emily Fan, Respondent's San Francisco branch manager, testified that Higgins was removed from the Fairmont account because of performance problems, namely, that after having been cautioned by Fan and Smith, he continued to socialize with other employees outside the security booth in a manner that affect his job duties.

Contrary to Higgins' testimony, Smith testified that she did not advise Higgins that his complaint against Saucedo had anything to do with his removal from the Fairmont account. Moreover, she told Higgins that when he left the premises on the day he was removed from the Fairmont account, "he was not to come back and confront anybody at the site, during their work hours. That he's not to go back and confront anybody."

B. Analysis and Conclusions

In analyzing rules of conduct promulgated by employers, the Board requires a reasonable adjustment or balancing of the rights of employers and the Section 7 rights of employees. As the Board has stated in *Lafayette Park Hotel*, 326 NLRB 824 (1998), regarding an employer rule that prohibits employees from "engaging in conduct that does not support the [Employer's] goals and objectives":

> We conclude that the mere maintenance of this rule would not reasonably tend to chill employees in the exercise of their Section 7 rights. In this regard, the rule… addresses legitimate business concerns. . . . We find no ambiguity in this rule as written. Rather, any arguable ambiguity arises only through parsing the language of the rule, viewing the phrase "goals and objectives" in isolation, and attributing to the Respondent an intent to interfere with employee rights. We are unwilling to place such a strained construction on the language, and we find the employees would not reasonably conclude that the rule as written prohibits Section 7 activity.

The complaint alleges that the Respondent's handbook contains provisions that inhibit lawful protected concerted activity under the Act. General orders, paragraph 5 (supra), contains the following language:

> While on duty you must follow the chain of command and report only to your immediate supervisor. If you are not satisfied with your supervisor's response, you may request a meeting with your supervisor and his or her supervisor. If you become dissatisfied with any other aspect of your employment, you may write the Manager in Charge or any member of management. Written complaints will be acknowledged by letter. All complaints will receive prompt attention. Do not register complaints with any representative of the client.

Inasmuch as the provision does not clarify the language "any other aspect of your employment," a reasonable reading of this

[3] Higgins acknowledges that in April, Saucedo, whom Higgins considered his superior, had lodged some complaints against him for not remaining at his post, leaving his post frequently, and speaking to Fairmont employees in their native languages, and that 'in my final month there" Fairmont Security Director Miller "asked that I tone it down, that I was being too cheerful." Apparently Higgins' complaint against Saucedo was believed by Fairmont human resources personnel to have been precipitated by Saucedo's complaints against him. Higgins acknowledged that he and Saucedo "were having our problems."

language appears to preclude employees from seeking assistance from the Respondent's clients regarding *all* aspects of their employment, Precluding employees from contacting and enlisting the assistance of Respondent's clients or customers regarding dissatisfaction with wages, hours or conditions of employment limits employees' protected concerted activities and has been found, in similar circumstances, to be violative of the Act. *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990); *Greenwood Trucking, Inc.*, 283 NLRB 789 (1987)). Accordingly, I find that the handbook provision prohibiting employees from registering complaints with clients' representatives is violative of the Act as alleged.

It is alleged that general orders, paragraph 18 (supra), unlawfully inhibits solicitation and distribution of literature by prohibiting such solicitation and distribution while "in uniform." Respondent's supervisor testified that if employees remove their uniform jacket or cover their uniform with a nonofficial jacket or covering prior to engaging in solicitation or distribution of literature, they would not be in violation of this provision. It seems that a fair reading of this provision would reasonably put the employees on notice that such activities are permitted when their attire does not denote that they are acting in an official capacity on behalf of the Respondent. The General Counsel argues that the gravamen of this violation is the Respondent's alleged failure to communicate to the employees that their uniforms must be removed or properly covered. The General Counsel does not appear to argue that employees should be permitted to engage in solicitation and distribution activities while in uniform. As noted, I find the provision to be sufficiently clear on its face to advise employees that they should not engage in unofficial business while in uniform. This implies that such activities are permissible provided they are not in uniform; and it seems reasonable to presume that employees, without having to be specifically told, would understand that removing or covering their uniforms will constitute compliance with this provision. I shall dismiss this allegation of the complaint.

It is alleged that Regulations, paragraph 4 (supra), unlawfully inhibits protected concerted activity by prohibiting "fraterniz[ation] on duty or off duty, dat[ing] or becom[ing] overly friendly with the client's employees or with co-employees." The General Counsel would read this provision broadly to preclude employee meetings or gatherings or discussions for the purpose of engaging in protected concerted activity. I do not agree. This provision must be interpreted in the context of the employees' duties, namely, to insure the protection of individuals and property. Clearly, the provision is designed to provide safeguards so that security will not be compromised by interpersonal relationships either between Respondent's fellow security guards or between Respondent's security guards and clients' employees. I find that it does not on its face, or by reasonable implication, preclude activities protected by the Act. I shall dismiss this allegation of the complaint.

Regarding the matter of Higgins' removal from the Fairmont account, the Respondent's witnesses denied that Higgins' removal was motivated by his complaint against Saucedo; rather, according to the Respondent, Higgins was removed because of performance problems having nothing to do with his complaint against Saucedo. The only issue raised by the complaint is whether Higgins was removed because he engaged in concerted protected activity. This requires a showing that the Respondent knew he was acting in concert with others, and not on his own, in complaining about and seeking Saucedo's demotion for uttering racial slurs.

Assuming arguendo that Higgins' testimony should be credited in its entirety, there is nothing Higgins wrote in his memo or said during his subsequent joint interview with representatives of the Respondent and the Fairmont that would have reasonably indicated that his complaint was concerted. I disagree with the General Counsels' argument that the following language in Higgins' memo shows concerted activity:

> I am compiling a list of people who have also heard Mr. Saucedo use the word 'Johnnie' when referring to people of African Heritage. The first name on the list: Larry Grant.

Higgins merely names one employee whom he avers has heard Saucedo make such a remark, but does not state that he is representing or speaking on behalf of this individual and/or others. Further, his memo states, "I do not feel Mr. Saucedo should be involved in the 'hiring and firing' process of the Security Dept.," thus seeming to speak on his own behalf in the singular, rather than as an advocate for others. Nor, according to Higgins' testimony, did any representative of the Respondent or the Fairmont, during the course of the interview, either ask Higgins whether he was speaking on behalf of others, or indicate they believed he was speaking on behalf of others. To the contrary, it appears the interviewers believed Higgins' complaint against Saucedo was a reaction to and motivated by Saucedo's recent complaint against Higgins for neglecting his assigned duties, and thus was a personal matter.

The Board requires employer knowledge of concerted activity as a necessary element of proof in such situations. See *Reynolds Electric, Inc.*, 342 NLRB No. 16 (2004):

> We assume arguendo that Rice's talking to the Respondent's employees was concerted activity. However, as noted, there is no evidence that the Respondent knew of this concerted activity. Thus, it has not been shown that the Respondent fired Rice in reprisal for his concerted activity. [Footnote omitted.]

Here, it does not appear that Higgins had engaged in concerted activity; but even assuming arguendo that he did, the proof of Respondent's knowledge of such activity is lacking. On the basis of the foregoing, I shall dismiss the complaint allegations pertaining to Higgins.[4]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) of the Act only as set forth herein.

THE REMEDY

Having found that the Respondent has violated and is violating Section 8(a)(1) of the Act, I recommend that it be required to cease and desist therefrom and from in any other like or re-

[4] I credit Smith's testimony and find that upon removing Higgins she told him that when he left the premises, "he was not to come back and confront anybody at the site, during their work hours. That he's not to go back and confront anybody." Clearly this admonition was simply a precautionary safeguard to insure that there would be no confrontation, particularly between Higgins and Saucedo and, I find, was not calculated to impede Higgins' Sec. 7 rights.

lated manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. I shall also recommend the posting of an appropriate notice, attached hereto as "Appendix."

If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."[5]

ORDER

The Respondent, Guardsmark, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing a handbook provision prohibiting employees from registering complaints regarding their wages, hours, or conditions of employment with Guardsmarks' clients.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) Within 21 days after receipt of this decision advise its employees, nationwide, that the handbook provision regarding registering complaints with clients is not to be understood as limiting the right of employees to engage in activities protected by the National Labor Relations Act.

(b) At a time when the employee handbook is to be revised or reissued, either delete the handbook provision prohibiting employees from registering complaints with clients, or modify the said language so that it does not prohibit activities protected by the National Labor Relations Act.

(c) Within 14 days after service by the Region, post at its San Francisco, California office copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and shall remain posted by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 21 days after service by the Regional Office, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: July 28, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce a provision in our employee handbook that may be reasonably interpreted as prohibiting employees from registering complaints with clients regarding wages, hours, or other conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the foregoing rights guaranteed under Section 7 of the Act.

GUARDSMARK, LLC

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.